No. 83124-6

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

IN

MATTHEW CUDNEY,

Plaintiff,

v.

ALSCO, INC., a Nevada corporation,

Defendant.

ALSCO'S RESPONSE BRIEF

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I. INTRODUCTION

The two certified questions presented to this Court by the United States District Court for the Eastern District of Washington center on the existence of the "jeopardy" element of a wrongful discharge in violation of public policy claim. To satisfy the jeopardy element, Plaintiff Matthew Cudney must prove that the remedies provided by the legislature do not adequately protect the identified public policy. See Hubbard v. Spokane Cy., 146 Wn.2d 699, 713, 50 P.3d 602 (2002); see also Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 181, 125 P.3d 119 (2005). This is consistent with the rationale underlying the narrow claim for wrongful termination in violation of public policy, which is to provide a means to protect public policy when no other adequate avenue is available.

Washington's Industrial Safety & Health Act ("WISHA"), and its supporting regulations, sets forth a comprehensive statutory framework providing remedies for employees who believe they have been discriminated against because of raising work-place safety issues, as Cudney claims here. See RCW 47.170.16 and WAC 296-360. The Washington legislature recognized the public policy of work-place safety and codified specific and adequate remedies for those who believe they have been harmed for reporting acts that contravene this public policy. If

this Court were to declare these statutorily delineated remedies "inadequate," it would impermissibly infringe upon the province of the legislature.

Washington has also empowered numerous State and local agencies with the jurisdiction, authority, and duty to enforce the State's criminal laws. Individuals, such as Cudney, play an important role in this system by reporting crimes to the appropriate law enforcement authority via the State's 9-1-1 system. This service, and other law enforcement measures, serves to effectively safeguard the important public policy of preventing drunk driving. Because it cannot be said that Washington's criminal code, law enforcement system, and judicial system are "inadequate" alternative means of protecting society against drunk driving, a separate employment-related tort for wrongful discharge based on reporting of suspected drunk driving should not be recognized in Washington. Accordingly, both certified questions should be answered in the affirmative.

II. ASSIGNMENTS OF ERROR

This case is before the Court on certification of the following two questions from the United States District Court for the Eastern District of Washington:

Question 1: Does the Washington Industrial Safety & Health Act (WISHA), in particular RCW 49.17.160, and accompanying Washington Administrative Code (WAC) regulations (WAC 296-360-005 et seq. and WAC 296-800-100 et seq.), adequately promote the public policy of insuring workplace safety and protecting workers who report safety violations, so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

Question 2: Do the drunk driving laws of the State of Washington, in particular RCW 9.91.020, RCW 46.61.504, and RCW 49.61.502, adequately promote the public policy of protecting the public from drunken drivers, so as to preclude a separate claim by a terminated employee for wrongful discharge in violation of public policy?

III. STATEMENT OF THE CASE

Cudney expends seventeen pages of his opening brief discussing the underlying facts of the case. Because resolution of the certified questions is not dependent on the underlying facts, an extended discussion of the background facts is not necessary. Nonetheless, to place Cudney's version of the case in context, ALSCO identifies the reasons he was terminated, none of which have anything to do with concerns Cudney raised about the consumption of alcohol during working hours or reporting concerns about employees driving while intoxicated.

Cudney was hired by ALSCO as the Service Manager of the Spokane branch in 2004. ALSCO's Statement of Material Facts ("DSOF") 1. The Service Manager is to call on customers regularly in order to establish favorable business relationships. The Service Manager position represents ALSCO to its customers, and the Service Manager is required to present a positive, businesslike personal appearance and attitude. DSOF 2. Another function of the Service Manager is to foster a positive work environment with the managers and sales personnel that report to him or her, and to motivate and enhance the morale of employees. DSOF 3.

On April 5, 2004, Cudney acknowledged receipt and understanding of ALSCO's Alcohol & Drug Free Workplace Policy. DSOF 4. Under this policy, as well as another stand-alone Drug and Alcohol Policy, ALSCO has a "zero-tolerance" drug and alcohol policy, equally applicable to employees and management, the violation of which could result in termination. DSOF 5 and 6.

During Cudney's tenure with ALSCO, he received counseling from his supervisor, Marty Siebe, regarding his relationships with co-workers and subordinates. Mr. Siebe explained to Cudney in May 2006 that he needed to take a look at the part he played and the responsibilities that he had in the many conflicts that had arisen with ALSCO members.

DSOF 7. Cudney was counseled that it was his job to lead other ALSCO employees and was advised that, if he could not lead effectively, he could not sufficiently perform his job. DSOF 8.

Of note, Cudney admits that he complained of John Bartich's alcohol use to management numerous times during his tenure at ALSCO. Cudney Brief at pages 5 and 11. Indeed, Cudney states that management was "well aware" of the alcohol issues before he raised the issues. Id. at page 11. It is not alleged, however, that any of these prior complaints resulted in any adverse employment action against Cudney. Cudney has failed to explain why he believes ALSCO saw fit in 2007 to terminate his employment based on complaints of Bartich's alcohol use, despite the fact that he had raised similar complaints to management since joining ALSCO three years earlier.

ALSCO received numerous complaints about Cudney from both customers and employees and began losing customer accounts because of Cudney's actions. DSOF 9. ALSCO has identified 53 employees who complained about Cudney's conduct. DSOF 11. ALSCO also learned that some of its key employees were quitting because they could no longer work with or for Cudney. DSOF 10.

In December 2007, Cudney engaged in an email exchange with his supervisor, Assistant General Manager Marty Siebe, where Cudney

advised Siebe, "I don't appreciate the attitude that I am getting from you about this." In response, Siebe indicated that Cudney "really crossed a line this time," to which Cudney responded: "We need to talk. I have been meaning to talk to you about the disrespectful tone you often take toward me, which has to stop." DSOF 12.

In June 2008, Cudney raised a concern about alcohol use by John Bartich during working hours. The following day, Doug Meyers, ALSCO's Spokane human resources manager, and Marty Siebe determined that, because Cudney was the only witness to the alleged incident, they would monitor Bartich on an ongoing basis, and, if they witnessed any behavior consistent with alcohol consumption while Bartich was working, they would immediately and directly address the issue with him. DSOF 13.

After Cudney observed Bartich in June 2008, he thought about calling 911 to report what he believed to be an intoxicated driver. While he did not call 911, he did think about that "later on." Cudney admitted that when he saw Bartich in June 2008, he had a concern for the public safety, and that he knew he could call 911 to report a drunk driver. Nonetheless, he felt it was the human resources manager's responsibility to make efforts to get Bartich off the road "and if that meant calling John on his cell phone or calling 911, you know, we could have done that

together." DSOF 14. Despite this testimony, which was given via deposition, Cudney later claimed in an affidavit that he did not call 911 because he was afraid for his job. This fear was not revealed in his deposition and is only supported by Cudney's subjective belief.

On July 17, 2008, Cudney was involved in a verbal confrontation with a subordinate, which the employee reported to management as a complaint. According to the employee, Cudney "unleashed an expletive filled, personal verbal attack on" him, which occurred after Cudney kicked the employee's truck and jumped in the cab. In response, Cudney sent an email to Marty Siebe, which, like on prior occasions, took a defensive tone, and did not reflect a recognition that he played any role in the confrontation. DSOF 15.

Cudney was terminated from employment with ALSCO on August 5, 2008. Cudney was terminated because he had lost his ability to lead by failing to gain perspective, understanding, and awareness of his tendency to make people mad, feel demeaned, and/or talked down to, as well as the fact that employees in his department did not want to work with or for him. DSOF 16.

IV. ARGUMENT

A. Public-Policy Exception To At-Will Doctrine Is A Narrow One.

In Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984), this Court confirmed the applicability of the at-will doctrine, and analyzed whether to "modify the common law terminable at will rule." The Court left the at-will doctrine largely intact, but carved out a "public policy" exception, under which "an employer can be liable in tort if he or she discharges an employee for a reason that contravenes a clear mandate of public policy." Id. at 233.

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, *courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.*

Id. at 232 (emphasis added). This "**narrow public policy exception**" was adopted because it properly balances the interests of both the employer and employee.

> The employee has the burden of proving his dismissal violates a clear mandate of public policy. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened. This protects against frivolous lawsuits and allows trial courts to weed out cases that do not involve any public policy principle. It

> also allows employers to make personnel decisions without fear of incurring civil liability.

Id.

This Court has affirmed its recognition that, while a public policy exception to the at-will doctrine exists, it is a narrow one borne from the letter and policy of statutes enacted by the Legislature, not an exception that is to be expanded by the judiciary. For this reason, courts must proceed "cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at will." Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).

B. Cudney Must Prove All Four Elements of His Wrongful Termination Claim.

This Court has adopted a four-part test to determine the existence of a public policy tort. Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996). To prevail on his claim, Cudney must prove (1) the existence of a clear public policy (the clarity element); (2) that discouraging the conduct in which he engaged would jeopardize public policy (the jeopardy element); (3) that the public-policy-linked conduct caused his dismissal (the causation element); and (4) ALSCO failed to offer an overriding justification for the dismissal (the absence of justification element). Id. at 931. Each of the elements in the four-part test must be met. Ellis v. City of Seattle, 142 Wn.2d 450, 459,

13 P.3d 1065 (2001)..

The two certified questions before this Court relate to the "jeopardy" element. Specifically, this Court has been asked to resolve whether the statutes identified by the Federal District Court provide "inadequate" means of protecting the identified public policies. Because there are effective and adequate alternative means of advancing the public policies at issue in this case, Cudney cannot satisfy the jeopardy element of his claim.

C. Cudney Cannot Satisfy the Jeopardy Element of His Claim.

If a specific public policy is identified (the clarity element), then to establish jeopardy, "plaintiffs must show they engaged in particular conduct, and that the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy." Gardner, 128 Wn.2d at 945. This burden requires Cudney "to argue that other means for promoting the policy . . . are inadequate." Id. at 945; see also Hubbard v. Spokane County, 146 Wn.2d 699, 713, 50 P.3d 602 (2002) (to establish the jeopardy element, a plaintiff must show that he or she engaged in particular conduct, and that the conduct *was necessary for the effective enforcement of the public policy)*; Korslund, 156 Wn.2d at 181 (concluding, as a matter of law, comprehensive statutory remedies against

retaliation for reporting safety violations in nuclear industry adequately protected relevant policy interests); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 442-443, 191 P.3d 879 (2008) (holding that, in connection with the tort of wrongful discharge in violation of public policy, if the plaintiff cannot show that the other means of promoting the public policy are inadequate, a plaintiff cannot satisfy the "jeopardy" element of the tort).

The "jeopardy" element "guarantees an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened." Gardner, 128 Wn.2d at 941-942. "The other means of promoting the public policy need not be available to a particular individual, so long as the other means are adequate to safeguard the public policy." Hubbard, 146 Wn.2d at 717.

Whether the jeopardy element is satisfied generally involves a question of fact; however, whether adequate alternative means for promoting the public policy exist may present a question of law, such as when the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting public policy. Korslund, 156 Wn.2d at 182.

This Court recently clarified the adequacy of remedy concept in Danny v. Laidlaw Transit Services, Inc., 165 Wn.2d 200, 193 P.3d 128

(2008). In Laidlaw, this Court confirmed that to satisfy the "jeopardy" element, the employee "must prove that discouraging the conduct in which [she] engaged would jeopardize the public policy." Id. at 222 (citing Gardner, 128 Wn.2d at 941). Critical to the issues in this case, the Court also held that the "jeopardy" element "***strictly*** limits the scope of claims under the tort of wrongful discharge." Id. at 222 (emphasis added). Based on this strict limitation, this Court noted, as an example, that for the plaintiff "to show that her conduct satisfies the 'jeopardy' element, she will have to show that the time she took off work was the ***only available adequate means*** to prevent domestic violence against herself or her children or to hold her abuser accountable." Id. (emphasis in original).

Thus, Laidlaw clarified the "adequate means" standard discussed in previous cases, by holding that a plaintiff must not only show inadequacy of other means, but also that the complained of conduct (here reporting alcohol use at work and drunk driving to management) was the "***only available adequate means***" of protecting the public policy. In light of the undeniable protections afforded by WISHA and the DUI statutes, in no way can it be said that employee complaints to management about work-place alcohol use is the "only available adequate means" of protecting the identified public policies.

Here, Cudney relies on the public policies promoting work-place safety, as codified in WISHA, and preventing drunk driving, as codified in Washington's criminal code, in support of his wrongful discharge claim. Because the legislature ***expressly*** provided statutory and regulatory safeguards to protect these public policies, Cudney cannot show they are inadequate. Further, in light of these protections, Cudney cannot show that addressing his concerns to ALSCO management was the "only available adequate means" of protecting the public policies. Since the legislatively created remedies implemented to safeguard the public policies themselves shape the nature and scope of the public policy, extending the remedies to include a separate cause of action in tort would effectively expand the public policy, something this Court said it will not do. Sedlacek, 145 Wn.2d at 390 (wrongful discharge tort shaped by the letter and policy of statutes enacted by the Legislature and is not an exception that is to be expanded by the judiciary).

D. WISHA Contains Adequate Remedies to Protect Workers Who Raise Work-Place Safety Concerns, Including Work-Place Alcohol Use.

Pursuant to WISHA, RCW 49.17.110, employees are afforded a regulatory avenue to report work-place safety concerns to the Department for investigation:

> Any employee ... who in good faith believes that a violation of a safety or health standard, promulgated by rule under the authority of this chapter exists that threatens physical harm to employees, or that an imminent danger to such employees exists, may request an inspection of the work place by giving notice to the director or his authorized representative of such violation or danger. .... If upon receipt of such notification the director determines that there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection as soon as practicable, to determine if such violation or danger exists.

In RCW 49.17.160, the Washington legislature set forth a specific administrative remedy for those who believe they have been discharged for raising safety concerns, such as those raised under RCW 49.17.110:

> (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.
>
> (2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within 30 days after such violation occurs, file a complaint with the director alleging such discrimination. Upon receipt of such complaint, the director shall cause such investigation to be made as he deems appropriate. If upon such investigation, the director determines that the provisions of this section have been violated, he shall bring an action in the superior court of the county wherein the violation is alleged to have occurred against the person or persons who is alleged to have violated the provisions of this section. If the director determines

> that the provisions of this section have not been violated, the employee may institute the action on his own behalf within 30 days of such determination. In any such action, the superior court shall have jurisdiction, for cause showing, to restrain violations of subsection (1) of this section and order all appropriate relief including the hiring or reinstatement of the employee to his former position with back pay.

"RCW 49.17.160 both states a policy and affords a remedy. Whether the action contemplated by the statute is brought by the Department or by the employee, the court is empowered to order 'all appropriate relief.' ***A more comprehensive remedy could not be imagined***, and there is no room for 'judicial legislation.'" Jones v. Industrial Electric-Seattle, Inc., 53 Wn. App. 536, 538-539 768 P.2d 520 (1989) (disapproved on other grounds in Wilmot v. Kaiser, 118 Wn.2d 46, 66, 821 P.2d 18 (1991) (emphasis added)).

Comprehensive regulations have been promulgated to implement this important procedural and substantive provision and to protect workers who raise work-place safety concerns. See WAC 296-360. In particular, WAC 296-360-050 recognizes that enforcing "the provisions of RCW 49.17.160 is not only a matter of protecting rights of individual employees, but also of ***protecting the public interest.***" (emphasis added). Accordingly, "attempts by an employee to withdraw a filed complaint will not necessarily result in termination of the division's investigation" and the

"division's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee." Id. Further, WAC 296-360-100(3) recognizes that the "protection offered employees by WISHA would be seriously undermined if employees were discouraged from lodging complaints about industrial safety and health matters with their employers. Complaints to employers, if made in good faith, are related to WISHA, and an employee is protected against discharge or discrimination caused by a complaint to the employer."

Based on the forgoing, the following remedies are available under RCW 49.16.170 to promote public policy:

1. An employee may file a complaint with the Director of L&I alleging improper employer conduct;
2. Because of the strong public policy, once the complaint is filed, the Director may continue with the investigation even if the complaint is withdrawn by the employee;
3. The Director ***MUST*** conduct whatever investigation "he deems appropriate";
4. If the Director determines that a violation occurred, he ***MUST*** bring an action in superior court against the person or persons who are alleged to have committed the violation;

If the Director determines that a violation did not occur, the aggrieved employee may bring a court action on his own;

5. In an action by the Director or the employee, the court may (1) restrain further violations; (2) and order ***all appropriate relief***, including rehiring or reinstatement, with back pay.

The State Legislature has not only seen fit to statutorily recognize the import of work-place safety, but also prescribe specific procedures and wide-ranging remedies for those employees who are mistreated for raising safety concerns. As WISHA allows a court the power to award "all appropriate relief" in addressing such employee complaints, it cannot be said that these remedies are "inadequate" to safeguard work-place safety.

1. Analysis in Korslund Controls this Case.

In Korslund, this Court was faced with a wrongful termination in violation of public policy claim, involving reports of safety violations and mismanagement at the Hanford Nuclear Reservation. The Court held, as a matter of law, that the "plaintiffs have not satisfied the jeopardy element of the tort of wrongful discharge in violation of public policy ***because there is an adequate alternative means of promoting the public policy on which they rely."*** Korslund, 156 Wn.2d at 181 (emphasis added). This Court recognized that the Energy Reorganization Act (ERA) was enacted for public safety and health and also made it illegal for employers to

retaliate against employees, who are in the best position to observe and report violations. Id. at 181. This Court also recognized that the ERA provides an administrative process for adjudicating whistleblower complaints and grants remedies such as reinstatement, back pay, and other relief. Id. at 182. "The ERA thus provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs." Id. Based on this analysis, this Court held that "the remedies available under the ERA are adequate to protect the public policy on which the plaintiffs rely." Id. at 183.

Like the alleged ERA violation in Korslund, employees are in the best position to recognize and raise issues of work-place safety under WISHA and are required to report them. Because of this, the Washington State Legislature has specifically set forth a statutory and administrative process for adjudicating complaints relating to work-place safety, including allegations that an employee was discriminated against for raising a safety concern.

In determining whether Cudney has satisfied the jeopardy element, the Court must assess whether he has established that other means of promoting the public policy are inadequate. The focus of the inquiry is on the ***adequacy*** of available remedies and protections to promote the public

policy, not whether the statute provides all available civil remedies, as Cudney suggests.

Cudney spends considerable time reviewing the possible remedies that ***might not*** be available under WISHA. But he fails to address the remedies that are, in fact, available under the statute and the mechanism provided by the legislature to prevent employees from being terminated for raising safety concerns, including mandatory instructions to the Director of L&I to pursue such charges in court. A review of these remedies and protections reveals that they clearly provide an ***adequate*** means to address the public policy concerns, even if they may not present all possible remedies available in tort. It was up to the Washington legislature to decide the appropriate remedies to protect the public policy, and it did so. The fact that Cudney believes more is warranted does not justify the expansion of the "narrow" public policy exception to the at-will doctrine.

Like the ERA[1] discussed in Korslund, RCW 49.17.160 provides two levels of protection to guard work-place safety and the reporting of

[1] Like WISHA, the Energy Reorganization Act of 1974 (ERA) provides an administrative process for adjudicating whistleblower complaints. 42 U.S.C. 5851(b); see Bricker v. Rockwell Int'l Corp., 22 F.3d 871, 874 (9th Cir. 1993) (remedy includes "reinstatement with back pay, compensatory damages, and attorneys and expert witness fees incurred in prosecuting a complaint"). However, unlike WISHA, the ERA does not

violations. First, if a claim is raised, the Director of L&I ***must*** perform an investigation using all appropriate means and, if the statute has been violated, the Director ***must*** file a lawsuit seeking to redress the situation. This, in and of itself, reflects a very strong alternative means of protecting employees who raise concerns about work-place safety. That an individual aggrieved employee may not receive full compensatory relief is not dispositive of the public policy issues. Rather, protection of the public policy is paramount. "The other means of promoting the public policy need not be available to a particular individual, so long as the other means are adequate to safeguard the public policy." Hubbard, 146 Wn.2d at 717. The instruction to the Director to investigate and bring legal action satisfies this standard, even if all civil remedies may not be available to Cudney.

Second, if an employee disagrees with the Director's findings in the investigation, he or she has the right to seek a broad range of remedies in court. The statute specifically provides for reinstatement or rehiring, with back pay. This does not foreclose other remedies. Indeed, under the statute, the court is given far-reaching authority to order "all appropriate relief." While Cudney asserts that the remedies under ERA are broader

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allow the court to implement "all appropriate relief." In this regard, WISHA provides a broader remedy than the ERA.

than WISHA, it does not appear that Congress provided courts with such a broad sweeping grant of authority under ERA.

Cudney also claims the remedies under RCW 49.17.160 are inadequate because of the thirty-day time period prescribed by the state legislature to address complaints.[2] Cudney asserts that this is too restrictive.

First, Cudney offered nothing that would indicate he was not capable of complying with the time limit set forth in RCW 49.17.160. Indeed, as he acknowledges in his Complaint, he reported the concerns underlying his public policy claim to ALSCO management on the day he observed them and also reportedly confirmed his complaints to several co-workers the same day. Further, Cudney admits he raised similar concerns of Bartich's work-place alcohol use to management in the years preceding June 2008, but failed to bring the issue to the attention of the Department. Certainly, if Cudney had the wherewithal to raise the complaints when they occurred with both management and co-workers, he could have brought the matter to the Department's attention within thirty days.

More significantly, however, Cudney's time limitation argument ignores the admonition of this Court that it is the Legislature which

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[2] Cudney fails to mention that an employee under the ERA has ***60 days*** to petition the circuit court of appeals for review of an adverse order from the Secretary. 42 U.S.C. 5851(c).

determines the scope and extent of public policy. In this case, the Legislature not only defined the public policy, but also set forth what it felt was an adequate remedy to address conduct that undermined it, including a reasonable amount of time to raise complaints.

Under Thompson and the many cases that have followed, court's are not empowered to substitute their judgment in determining what is valid public policy, nor courts second guess the Washington State Legislature in determining adequate means of relief for violations of that public policy. As previously held in Sedlacek, 145 Wn.2d at 390, the public policy exception to the at-will doctrine is a narrow one born from the letter and policy of statutes enacted by the legislature, not an exception that is to be expanded by the judiciary, and courts must proceed "cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at-will." Id. The fact that the Washington State Legislature determined thirty days was sufficient time for employees to raise a complaint that they were discharged for reporting WISHA violations should be given considerable and appropriate deference in analyzing the adequacy of statutory remedies.

Cudney also suggests that it would be "up to chance" for an employee to know about the provisions of RCW 49.17.160, and his rights thereunder to seek redress. Cudney has offered no authority, and ALSCO

has not located any, suggesting that specific knowledge of a statutory remedy is relevant in the analysis. Notably, there is no discussion in Korslund as to whether the employees in that case were aware of their rights under ERA to pursue a claim. Moreover, it seems incongruent that Cudney could rely on WISHA statutes and regulations to support his claim that a public policy exists, but ignore the statutory and regulatory provisions that provide adequate remedies to him to redress their alleged violations.

2. Additional Authority Supports ALSCO's Position.

The Court's decision in Korslund is consistent with the holding in Blinka v. Washington State Bar Association, 109 Wn. App. 575, 36 P.3d 1094 (2001), where a former WSBA attorney sued the WSBA for wrongful termination and retaliatory discharge linked to testimony she provided against her employer in a discrimination lawsuit initiated by another employee. Blinka asked the court to find an existence of a clear mandate of public policy based on CR 45 and federal and state laws against perjury. Blinka argued that, by responding to a legally issued subpoena and giving truthful testimony in a deposition, she engaged in activity that CR 45 and the perjury laws were intended to encourage. Id. at 585. The Court of Appeals agreed that CR 45 and the laws against

perjury provide the foundation for a public policy prohibiting adverse employment action for responding to a subpoena and recognized that, by criminalizing false statements made under oath, the state and federal perjury statutes operate as a deterrent to false testimony. Id. at 585-586. Nonetheless, the court was "informed" by Thompson and its progeny about the cautious approach to application of public policy exception to the at-will employment doctrine. Id. at 586. "While we acknowledge that CR 45 and the perjury statutes provide the foundation for public policy prohibiting adverse employment action for responding to a subpoena, or refusing to give false testimony (neither of which occurred here), ***we decline to recognize the more broad policy Blinka proposes in this case in light of the already existing protections afforded Blinka under Chapter 49.60 RCW (Washington's law against discrimination).***" Id. at 586 (emphasis added). "As Thompson suggests, the public policy exception to the at-will employment doctrine is a narrow one—one that should be recognized only when offensive conduct would otherwise go unredressed." Id.

While WISHA expresses a clear mandate of public policy, this Court should not recognize the broad policy advanced by Cudney in light of the already existing protections he and others similarly situated are afforded under the WISHA statutes and regulations. Because the public

policy exception should be recognized "only when offensive conduct would otherwise go unredressed," this Court should decline to recognize Cudney's wrongful termination claim under the legal arguments advanced here.

In Jones v. Rabanco Ltd, 439 F. Supp.2d 1149 (W.D. Wash. 2006), the Court held that the plaintiff had no claim for wrongful discharge in violation of public policy, as an adequate remedy existed under Washington's Law Against Discrimination ("WLAD"). Id. at 1166 (citing Korslund, 156 Wn.2d at 183). The Court found that while the WLAD does make a strong policy statement against racial discrimination, like WISHA does against work-place hazards, "it also provides him with adequate avenues for recovery." Id.

In Gustafson v. Bridger Coal Company, 834 F. Supp. 352 (D.C. Wy. 1993), the plaintiff alleged a wrongful termination in violation of public policy claim (initially characterized as an outrage claim) against his employer after he was terminated following his reporting of mining accidents and safety issues. The court noted that Wyoming recognized the tort of wrongful termination in violation of public policy, but declined to recognize it in that case because "another remedy was available." Id. at 355.

> A tort action premised on violation of public policy results from a recognition that allowing a discharge to go unredressed would leave a valuable social policy to go unvindicated. If there exists another remedy for violation of the social policy which resulted in the discharge of the employee, there is no need for a court-imposed separate tort action premised on public policy.

Id. (quoting Allen v. Safeway Stores, Inc., 699 P.2d 277, 284 (Wyo. 1985)).

In Gustafson, the court refused to recognize the plaintiff's asserted wrongful termination claim because the public policy of mining safety and reporting mining accidents was adequately protected by the whistleblower provision of the Mining Safety & Health Act, which provided for the remedy of reinstatement with back pay. Id. (citing Masters v. Daniel Int'l Corp., 917 F.2d 455, 456 (10th Cir. 1990) (affirming dismissal of wrongful discharge claim and holding that the remedies available under the Energy Reorganization Act's whistleblower provision were sufficient to displace any need for the public policy tort)).

Similarly, in White v. Sears, Roebuck & Co., 163 Ohio App.3d 416, 837 N.E.2d 1275 (2005), the plaintiff alleged wrongful termination in violation of public policy, where he was fired after he altered the time cards of employees who inaccurately recorded their time. He alleged that the state's minimum wage act required employers to accurately record and preserve time and constituted a sufficient public policy to support a tort

action. The court recognized the public policy but, following the same four-part test as Washington courts, rejected the claim based upon the failure of the jeopardy element. The court held that when "analyzing the jeopardy element, a court must inquire into the existence of any alternative means for promoting the particular public policy to be vindicated by a common-law wrongful-discharge claim....If a statutory remedy that adequately protects society's interests already exists, then there is no need to recognize a claim for wrongful discharge in violation of public policy." Id. at 424.

The White court gave the following example: "A plaintiff fired for protesting accounting irregularities who can establish a clear public policy in favor of accuracy in corporate record keeping, must also establish that the other means for promoting the policy, such as regulatory requirements for audits, criminal penalties, and rights of shareholders and creditors to maintain private civil actions, are inadequate." Id. As another example, the court cited the facts of an unpublished opinion, wherein the plaintiff asserted that Ohio criminal law manifested a clear public policy prohibiting individuals under the influence of narcotic drugs from operating a motor vehicle. The court noted that because there are statutory criminal and civil penalties for employers who allow an employee to drive

a commercial vehicle while intoxicated, the public policy in question was adequately protected. Id.

In accordance with this authority, the White court proceeded to find that, because the minimum wage act provides alternative means for promoting the public policy – inspection of records and criminal liability – there was no risk of the public policy being jeopardized through the employee's termination. Id. at 425 ("given the regulatory oversight and criminal penalties, the public policy requiring the maintenance of accurate employee time records is adequately protected"); see also Wiles v. Medina Auto Parts, 96 Ohio St.3d 240, 773 N.E.2d 526 (2002) (declining to recognize a wrongful termination in violation of public policy claim, where employee argued that he was terminated for exercising his rights under the federal Family & Medical Leave Act ("FMLA") because the Act provided a remedial scheme designed to compensate the employee for a violation of the Act, including wage loss: "We therefore conclude that Ohio does not recognize a cause of action for wrongful discharge in violation of public policy when the cause of action is based solely on a discharge in violation of the FMLA. An aggrieved employee's proper recourse for an employer's FMLA violation is to bring a cause of action authorized by Congress....").

Similarly, here, WISHA provides for investigation, inspection, and oversight for work-place safety concerns. See RCW 49.17.110. WISHA also contains a "whistle blower" provision for any employee who believes there has been a violation of safety and health standards. See id. Further, the Act protects reporting employees from retaliation due to any such reporting and provides an avenue for any employees who believe that they have been unlawfully discharged to file a complaint. RCW 49.17.160(1). Among the remedies is the "hiring or reinstatement of the employee to his former position with backpay." RCW 49.17.160(2). Moreover, WISHA provides for civil penalties of up to $70,000 for repeated WISHA violations by employers. RCW 49.17.180. WISHA adequately protects the public's interest in work place safety and provides adequate avenues for redress of employer violations. For this reason, it is not necessary to recognize a wrongful discharge claim based on the public policy embodied and protected by WISHA.

3. The Exclusivity Analysis Conducted by the Court in Wilmot is Materially Different than the Adequacy of Remedies Analysis Under Korslund.

Cudney relies heavily on this Court's decision in Wilmot v. Kaiser Aluminum, 118 Wn.2d 46, 821 P.2d 18 (1991), in support of his claim and in an attempt to distinguish Korslund. Relying on Wilmot, Cudney claims

that, because RCW 49.17.160 does not provide an exclusive remedy for public policy violations, "then it is hard to see how this statute exists as an adequate alternative means to promote a public policy." Cudney's Opening Brief at page 34. This is essentially the same argument considered and rejected by the Supreme Court in Korslund under the ERA.[3]

The Court in Wilmot considered whether RCW 51.48.025 was intended by the legislature to set forth mandatory and exclusive remedies for an employee who was terminated because of filing a worker's compensation claim, thus precluding a separate claim for wrongful discharge in violation of public policy. Wilmot, 118 Wn.2d at 56. In connection with its exclusivity analysis, the Court discussed whether RCW 51.48.025 provided all remedies potentially available to an aggrieved plaintiff in a tort cause of action. This is because "the comprehensiveness, or adequacy, of the remedy provided is a factor which courts and commentators have considered in deciding whether a statute provides the exclusive remedy for retaliatory discharge in violation of

[3] Wilmot was decided years before Gardner announced the four-part test for a wrongful discharge claim, including the analysis of the "jeopardy" element. Thus, when this Court in Wilmot addressed the exclusivity issue in the context of a wrongful discharge claim, the Court had yet to expressly require the presence of the jeopardy element.

public policy." Id. at 61. The Court ultimately held that, while "RCW 51.48.025(4) sets forth some remedies for retaliatory discharge in violation of the statute, it does not clearly authorize all damages which would be available in the tort action." Id. at 61. Because the statute did not "clearly" authorize "all damages" available in a tort action, the Court held the statute did not reflect an exclusive remedy to an aggrieved plaintiff. The Court did not hold, as suggested by Cudney here, that the remedies under RCW 51.48.025 were inadequate. To the contrary, the Court expressly declined to define the exact contours of the available remedies under the statute. Id.

Relying on Wilmot, Cudney asserts that the WISHA statute at issue - RCW 49.17.160 - does not expressly provide a claimant with all available civil remedies and, therefore, the remedies under RCW 49.17.160 are inadequate to provide an alternative means of promoting the public policy protected by WISHA. Even if Cudney is correct that RCW 49.17.160 does not reflect an exclusive remedy, it does not follow that Cudney has satisfied his burden to show that "other means for promoting the policy . . . are inadequate." See Gardner, 128 Wn.2d at 945. In fact, the Court expressly rejected this proposition in Korslund.

The Court in Korslund specifically addressed Wilmot's exclusivity analysis, finding it very different than the question before it relating to the

existence of the jeopardy element. In reversing the Court of Appeals' ruling, which relied upon Wilmot, this Court found that the Court of Appeals had "confused two distinct legal issues." Korslund, 156 Wn.2d at 183. Cudney's analysis suffers the same defect.

In Korslund, the Court observed that Wilmot addressed the issue of whether a provision in the Industrial Insurance Act (Title 51 RCW) precluded a tort cause of action for retaliation for filing a worker's compensation claim. In Wilmot, this Court "examined the relevant statute to determine whether the legislature intended that the statute, including its remedies, was mandatory and exclusive, and thus precluded the public policy tort cause of action." Id. In contrast, the question in Korslund was "not whether the legislature intended to foreclose a tort claim, but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy." Id. The Korslund court also held that "the Court of Appeals analysis conflicts with Hubbard, where we said that the other means of promoting the public policy need not be available to the person seeking to bring the tort claim so long as the other means are adequate to safeguard the public policy." Id. (internal quotes omitted).

The distinction between the Wilmot exclusivity analysis and the jeopardy analysis was discussed recently in Brundridge v. Fluor Federal

Services, Inc., 164 Wn.2d 432, 191 P.3d 879 (2008). There, this Court again noted that the Court of Appeals in Korslund ruled that the ERA remedies were not "mandatory and exclusive," and thus did not preclude the plaintiff from establishing the "jeopardy element." Id. at 443. According to the Brundridge decision, Division III of Washington's Court of Appeals in Korslund, "did not evaluate whether the ERA remedy procedures themselves were adequate to protect the public policy." Id. Cudney's argument here, and his reliance on Wilmot, suffers the same analytical deficiency.

4. Wilmot Does Not Resolve the Question of Whether Available Remedies are "Adequate" Under the Jeopardy Analysis.

Cudney spends considerable time discussing the remedies available under RCW 51.48.025. However, he mischaracterizes Wilmot as assessing the "adequacy of remedies" available under RCW 51.48.025 and equates that with the analysis required in determining whether the jeopardy element has been satisfied. As discussed above, these present "two distinct legal issues." Korslund, 156 Wn.2d at 183.

Wilmot examined the remedies under RCW 51.48.025 to determine if the statute contained a mandatory and exclusive remedy for the alleged wrongful conduct, for if it did, plaintiff's wrongful discharge claim would be barred. "While RCW 51.48.025(4) sets forth some

remedies for retaliatory discharge in violation of the statute, it does not clearly authorize all damages which would be available in the tort action." Wilmot, 118 Wn.2d at 61. The Court then discussed some of the civil remedies that ***may*** not be available under the statute. This analysis is quite different than the one required to address whether there is an adequate remedy under Washington law to satisfy the jeopardy element. Korslund, 156 Wn.2d at 183.

For example, while the Director's obligation under RCW 51.48.025 (like RCW 49.17.160) to prosecute charges of misconduct in court may not resolve the question of whether the statute provides an exclusive civil remedy, it shows that, at a minimum, the statute provides an adequate alternative means of promoting the public policy. Accordingly, the Court's discussion in Wilmot about the types of remedies that ***may*** not be available under RCW 51.48.025 does not focus on the correct issue in determining whether the jeopardy element has been satisfied and thus fails to advance Cudney's position.

E. Washington's DUI Statutes Provide an Adequate Means of Protecting the Public Policy Against Drunk Driving.

The Washington state legislature enacted a comprehensive criminal code, the purpose of which is to "forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests."

RCW 9A.04.020(1)(a). Under Washington's criminal code, every person may be tried and punished under the laws of the State of Washington for a criminal offense committed by him. RCW 9A.04.070.

Specifically, the Washington legislature has provided a detailed legislative framework criminalizing the conduct of driving a motorized vehicle while under the influence of alcohol. See RCW 46.51.502; RCW 46.61.504. The legislature also set forth a detailed penalty schedule for individuals convicted of violations of RCW 46.61.502 and 46.61.504. See RCW 46.61.5054 (providing additional fees for alcohol violators); RCW46.61.5055 (detailed penalty schedule for alcohol violators); RCW 46.61.5056 (requiring schooling, evaluation, and treatment for alcohol violators); RCW 46.61.50571 (requiring mandatory appearance for alcohol violators); RCW 46.61.5058 (providing for vehicle seizure and forfeiture for alcohol violators); RCW 46.61.5152 (providing for attendance at program focusing on victims for alcohol violators); RCW 46.61.520 (providing penalties for vehicular homicide caused by the operation of vehicles while under the influence of intoxicating liquors); and RCW 46.61.522 (providing penalties for vehicular assault when injuries are caused by the operation of a motor vehicle under the influence of alcohol).

The Washington legislature has also specifically recognized the role of witnesses in the criminal justice system and the importance their participation plays. In RCW 7.69.010, the legislature recognized "the civil and moral duty of . . . witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies . . .". In this section, the legislature also confirmed the importance of citizen cooperation "to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state . . .."

1. DUI Statutes, Criminal Laws, and Law Enforcement Are Not Inadequate to Protect the Public Policy Against Drunk Driving.

Cudney attempts to greatly expand the tort of wrongful discharge in violation of public policy by asserting that an employee who reports any crime to his employer thereby satisfies both the clarity and jeopardy elements of the tort. Such an expansion is unwarranted and would be in contravention of established Washington law.

The question for this Court is whether the Washington DUI statutes cited by Cudney and the related reporting procedures, mechanisms, law enforcement, and criminal penalties available thereunder, are adequate to protect the important public policy of preventing drunk driving. Specifically, as framed by this Court in

Korslund, "the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy." Korslund, 156 Wn.2d at 182. To rule in favor of Cudney, this Court would need to find that the existing DUI laws, criminal sanctions, and law enforcement system are an "inadequate" means of promoting the public policy against drunk driving, thereby necessitating a separate employment-related tort. Such a ruling is uncalled for.

There is no dispute that Cudney, and all other citizens, have the right and ability to inform law enforcement of a suspected drunk driver through any number of means. It is hard to conceive that this is not, at least, an adequate alternative means of promoting the public policy of preventing drunk driving. In light of the criminal laws and law enforcement system, Cudney cannot show that reporting a drunk driver to his employer is the "*only available adequate means*" to prevent drunk driving. See Laidlaw, 193 P.3d at 139 (emphasis in original).

Cudney has failed to prove, or even allege, that other means of addressing the valid public policy concerns which underpin the DUI laws were inadequate in this instance to protect the public's interest.[4]

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[4] Cudney claims he was concerned both for the public and for the liability of ALSCO. However, it is only the public concern that is addressed by his wrongful termination claim. Even well-meaning concern about corporate liability is not relevant.

Specifically, Cudney has not asserted that anything prevented him from calling the police using the 911 service, advising the authorities of his concerns, and providing them with information that could have allowed them to address the situation within minutes (vehicle location, make, model, and license number). Indeed, in his deposition, Cudney recognized he could have called 911 and informed the police of his concerns about a potential drunk driver. DSOF 14. Because Cudney failed to show that the available law enforcement remedies were inadequate to address the situation, he has not met the jeopardy element of his claim as a matter of law.

The question is not whether a particular statutory framework sets forth the best remedy or all available remedies, but whether "adequate" remedies are present under existing law. In fact, these remedies need not be available to a particular individual, so long as the other means are sufficient. "The other means of promoting the public policy need not be available to a particular individual, so long as the other means are adequate to safeguard the public policy." Hubbard, 146 Wn.2d at 717. As Cudney cannot show that reporting crimes to law enforcement and allowing them to do their job and enforce the laws is an "inadequate" alternative means of promoting the public policy, his claim fails. Korslund, 156 Wn.2d at 182.

2. The Out-of-Jurisdiction Cases Cited By Cudney Do Not Alter the Outcome.

Cudney cites two out-of-jurisdiction cases in support of his position. Critically, however, neither case utilizes Washington's standard for determining the existence of a wrongful discharge claim in violation of public policy.

In Chilson v. Polo Ralph Lauren Retail Company, 11 F.Supp.2d 153 (D.C. Mass. 1998), the plaintiff was terminated after internally reporting, among other things, that her supervisor was providing alcohol to minor employees and exposing herself to customers and employees at work. The plaintiff argued that she was fired for reporting her manager's criminal acts. The reviewing court considered whether such conduct fell under a claim for wrongful termination in violation of public policy. Id. at 157. The court noted that "it is clear under Massachusetts law that an at-will employee has a cause of action if discharged for complaining about criminal conduct, even if the complaint is made internally to the employer rather than to public authorities." Id. Without any real analysis, the court held: "For purposes of the motion to dismiss, these allegations are sufficient to make out a viable cause of action for wrongful discharge under Shea, supra." Id. at 158.

Chilson is readily distinguishable because Massachusetts does not use the exacting standard used in Washington to evaluate whether a sufficient public policy exists. Specifically, it does not use the four-part test articulated in Gardner, 128 Wn.2d at 935. Rather, Chilson was decided under a standard that provides redress for employees who are terminated for asserting a legally guaranteed right, for doing what the law requires, refusing to do what the law forbids, and (at issue in Chilson) "performing important public deeds." Id. at 157. Thus, the Chilson plaintiff was not required to demonstrate that existing means of discouraging the type of behavior in question were inadequate, an issue that Cudney cannot overcome under Washington law.

Cudney also cites Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841 (E.D. Mo. 2007). In that case, the plaintiff was terminated after reporting that a fellow-employee broke into a car that had been left in the employer's parking lot. The court noted that in Missouri, when an employee holds a reasonable belief that illegal conduct has occurred, there exists a "clear mandate of public policy" for purposes of a wrongful termination claim. Id. at 847. "An employee who has a reasonable belief that illegal activity is taking place should be able to report such belief to his or her supervisors without fear of termination." Id. The court in Kelly similarly found that the plaintiff could assert a cause of action for

wrongful termination in violation of public policy. Again, this case does not provide any real guidance for the Court because it is not based on Washington's framework for recognizing public policy-linked terminations.

In Missouri, a plaintiff establishes a cause of action for wrongful termination if he establishes that he was terminated for: "(1) refusing to perform an illegal act or an act contrary to a strong mandate of public policy; (2) reporting wrongdoing or violations of law or public policy by the employer or fellow employees to superiors or third parties; (3) acting in a manner public policy would encourage ...; or (4) filing a workers' compensation claim." Dunn v. Enterprise Rent-A-Car, 170 S.W.3d 1, 8 (Mo.App. E.D. 2005). Thus, like the plaintiff in Chilson, the plaintiff in Kelly was not required to demonstrate that the existing means of advancing the stated public policy were inadequate.

In reality, the two cases cited by Cudney only got to the first step of Washington's required test: the existence of a public policy. ALSCO acknowledges that Washington's DUI and WISHA statutes embody important public policies. Under Washington law, this (and, consequently, the outcomes of the cited cases) is irrelevant if the public policy is not jeopardized by plaintiff's termination.

F. ALSCO Had No Notice that the Public Policy Against Drunk Driving Had Employment Implications.

When a statute does not directly address the employment relationship, like Washington's DUI statutes, the court must examine the "clarity" and "jeopardy" elements simultaneously to find a nexus between the public policy and the ***workplace dispute*** and determine whether an important public policy would be jeopardized by permitting the termination under the circumstances. See Gardner, 128 Wn.2d at 946 (analyzing whether allowing employers to discharge employees for violating a work rule when necessary to save a life would contravene public policy favoring lifesaving activity). In engaging in this analysis, a court must act with restraint. Korslund, 156 Wn.2d at 180 (narrow construction rule applies most forcefully to the identification of clear mandates of public policy).

By necessity, nearly every statute embodies a public policy. However, for purposes of defining an employer's liability for wrongful discharge, the public policy must be "clear" in the sense that it provides specific guidance to the employer. Thompson, 102 Wn.2d at 232; see also Birthisel v. Tri Cities Health Servs. Corp., 188 W. Va. 371, 377 S.E.2d 606 (1992) ("An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or so

vague that it is subject to different interpretations"); Stevenson v. Superior Court, 16 Cal.4th 880, 889, 941 P.2d 1157 (1997) ("tethering public policy to specific constitutional or statutory provisions serves . . . to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge").

Here, no applicable statute, constitutional provision, administrative regulation, or other source of public policy cited by Cudney directly addresses whether, and to what extent, public policy limits an employer's ability to discharge an employee who reports an employee for an alleged violation of drunk driving laws. See Roe v. Quality Trans. Servs., 67 Wn. App. 604, 609, 838 P.2d 128 (1992) (court declined to find a clear expression of Washington public policy against drug testing employees, even though plaintiff cited a variety of tangentially related statutes to support her claim). The RCW sections cited by Cudney and related case law generally prohibiting driving under the influence of alcohol do not provide guidance sufficient to put an employer on notice that discharging an employee for reporting a co-worker's alleged drunk driving violation would be unlawful. See Fox v. MCI Communications, 931 P.2d 857, 862 (Utah 1997) (holding that, if an employee reports a crime to an employer, rather than the public authorities, and is fired for making the report, "that does not, in or view, contravene a clear and substantial public policy");

See also Mullins v. International Union of Operating Engineers Local No. 77, 214 F. Supp. 655, 667 (E.D. Virginia 2002) (declining to recognize a wrongful termination claim based on reporting illegal drug use by co-workers).

V. CONCLUSION

For the reasons stated herein, both certified questions should be answered in the affirmative.

RESPECTFULLY SUBMITTED this 13th day of July, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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